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THE

INDEPENDENT STATE OF THE CONGO

AND

INTERNATIONAL LAW

BY

Ernest NYS

PROFESSOR AT THE UNIVERSITY OF BRUSSELS
VICE-PRESIDENT OF THE TRIBUNAL OF FIRST INSTANCE

BRUSSELS
J. LEBÈGUE AND C°, BOOKSELLERS-EDITORS
46, RUE DE LA MADELEINE, 46

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THE INDEPENDENT STATE OF THE CONGO AND INTERNATIONAL LAW

In writing these pages our sole object is to explain, according to the principles of international law, what is the legal position of the Congo State, to consider when this State began to exist, what action was exercised over it by the Berlin Conference of 1884-1885, and to what extent the complaints which have recently been made against it are justified.

International law is by no means the wonderful panacea that is so readily believed; it has not even the direct mission of preventing injustice and violence; in other terms it must not act by itself. But like public law as well as private law, it places, on a wider field it is true, at the disposal of men rules and principles which they must themselves apply if they wish order to prevail, and thus to secure freedom. The law of nations, or, to employ modern terminology, international law, is the law which governs the relations of States. These are the subjects, the *points d'attache*, of the relations, of which international law is the statute.

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I

If we recall these elementary ideas, it is because they are too often lost sight of; too often writers and jurists neglect them, either on account of their holding fast to theories long since dead, or because they do not take into account the changes that have occurred in the domain of fact. The old definitions showed, in the law of nations, the law « which existed between several peoples or between the chiefs of peoples, » as Grotius said; they recognised the applicability of its rules to dynasties and sovereign houses. In contemporary legal science, international law only governs the relations of States.

The modern State itself is an institution quite different from the ancient forms of the political community. The word « State, » let us repeat (1), made its appearance tolerably slowly; it comes from that Italy of the close of the Middle Ages where almost all the creations of politics were produced; the State, *lo Stato*, was composed of the persons immediately around the Prince; it was the assemblage of those who directed and governed. Later the essence itself of the State, regarded as the central power, was modified. New attributes were conferred upon it; it was no longer a question of the ancient authority, tangible and visible, which manifested itself especially for the purpose of threatening and punishing. The idea of a juridical person made itself accepted, a person distinct from chiefs and citizens, a person whose will is itself distinct from the wills of its members. The modern

(1) E. Nys, *L'État et la notion de l'État*, Revue de droit international et de législation comparée, 2e série, t. III, p. 602.

State, the contemporary State, is thus an abstract being, living and acting by means of organs which are either individuals acting singly, or individuals organised in bodies. These organs are—the head, the people, the authorities; to speak exactly the authorities are not representatives of the State, they do not act for it. They are a part of the person of the State; they constitute in reality a part acting for the whole; and even in order that individuals, either taken singly or organised in bodies, may act officially and as authorities, they must observe forms, the non-observance of which is precisely that which would prevent their acts being anything else than personal acts (1).

The modern State has drawn up a programme which in its main lines is almost everywhere the same. It has claimed the right to make war, and has put an end to the barbarous practices of private war. It has modified the idea of the impost which, in the Middle Ages, resulted from a convention between the subjects and the prince, and which has become taxation imposed by the will alone of those who govern. It has nevertheless recognised that those subordinate to it possess rights as individuals and citizens. It has suppressed slavery and serfdom. It has abolished all orders that are irreconcilable with a truly national organisation. By the rule of equality, and especially by the obligation of personal military service it continues to override anything which might remain in force of the primitive organisations of clans and tribes. Finally while proclaiming freedom of conscience and religion, it shows a tendency to secularise its action, it reveals indifference to religious prescriptions.

Such is the modern State, such is the type already

(1) E. Nys, *op. cit.*, p. 617.

attained on a part of our planet. Such is the model that the greater number of political communities propose to themselves to imitate.

II

States, independent political communities, form in our day an international society; it is the « family of nations » to employ an old phrase, it is the « society of States » to make use of a more appropriate expression.

The society of States is a creation of the European genius, the appearance of which dates from the 12th and 13th centuries of our era. The first scene of action did not comprise even the whole of Europe. It made no extension towards the North East, and to finish with that point, it may be observed that it was only in the 18th century that Russia entered into the general system. Besides numerous were the lordships, the principalities, the kingdoms which under some title might claim the rank of subjects of the law of nations.

In Europe the formation of States with vast territories had the effect of reducing the number of members in the international organisation, whilst the geographical area grew larger over which diplomatic combinations were applied. At the close of the 18th century the United States of North America adhered to this « European » law of nations; in the middle of the 19th century, a Mahomedan State, Turkey, was admitted to participation in its advantages; at the end of the same century nations of other parts of the world ranged themselves alongside the peoples of Europe and America. We must dwell from this point of view on the International Peace Conference. When on 18th May 1899 it commenced

its labours at the Hague, twenty six Powers were represented there. Among them were European States, American States, Asiatic countries like China, Japan, Persia, Siam, and the resolutions which were adopted could be extended beyond the wide circle of contracting States by the adhesion of Powers which were not represented there.

We have said, and we repeat, dissertations from authors on the subject of the foundation of international law have become superfluous. The fact is there; there exists a society of States. The members which compose it have the idea of right, that is to say the free use of their faculties. They have the idea of duty contained in the idea of right, and inseparable from it. They are free.

That this society of States may be still imperfect, that in comparison with other forms of human association it shows serious gaps, and reveals serious defects, that to speak the truth it has not yet become a really collective act, and must be content to leave action to the most powerful nations—all this does not prevent its existing, its manifesting itself, its fulfilling in the work of humanity a great rôle. There is no room for doubt that the three elements, partly historical, partly psychological and moral, on which rests the very idea of the law of nations, are joined together in our days, namely the presence and coexistence of several autonomous States, the fact of a regulated and permanent intercourse between these States, and their willingness to mutually recognise themselves as subjects of the law, within the limits of the society of States, and submit their relations to a common judicial institution (1).

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(1) E. Nys, *Quelques définitions du droit international.* Revue de droit international et de législation comparée, 2e série, t. V, pp. 290 and the following.

The society of States is in no way a closed society. The accession of new States is possible, it is even easy. Every newly constituted State, possessing the characteristics of a civilised State, can enter the international association; the States forming that association cannot refuse it admission. The problem of accession has received an increasingly wider solution ; in other words accession has been made easier ; as the international society has become larger it has liberated itself from religious ideas, and tended also to constitute itself putting aside the question of race. Besides accession does not modify in any manner the existing organisation; it does not exact new measures of the States which already formed part of the association. There is finally another remark to be made. As Professor Westlake has said : — « To exclude a State from the international society is no more thought of, than it is in any particular State to expel a subject with the view of causing the law to be respected (1). »

A question arises, that of knowing to what point extends, according to one writer, « the framework of the international community (2). »

This problem was raised more than two centuries ago, when the idea prevailed according to which the law of nations was confined to Christian peoples. But the illustrious legal philosopher James Lorimer deserves the honour of giving it a rational solution.

In international law itself James Lorimer strove to obtain recognition for the old Aristotelian distinction between absolute equality and relative equality, and a return to the doctrine that the scholastic jurists called *proportio*. He admits the right of each State to be

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(1) J. Westlake, *Chapters on the principles of International Law*, ch. I.
(2) P. Leseur, *Introduction à un cours de droit international public*, p. 96.

recognised in the measure of its political development; he is in no sense an advocate of the equality of States. Studying more closely international recognition he notes that humanity forms in its present condition three concentric spheres, civilised humanity, barbarous humanity and savage humanity, to which corresponds a triple degree of recognition on the part of civilised nations, plenary political recognition, partial political recognition, and natural or mere human recognition. As James Lorimer says, the jurist who devotes himself to the study of international law has directly to deal only with the first of the three spheres that we have just named. Yet as progress consists not only in perfecting the relations which arise in the sphere of political recognition, but also in giving a wider expansion to that sphere, he finds himself at every moment in contact with external spheres, and must thus concern himself with the relations of communities brought face to face with others surrounding them that are partially civilised. He is not bound to apply international law positively to savage peoples or even to barbarous nations, but he is bound to inquire as to the point and stage at which barbarians and savages enter into the framework of partial recognition (1).

In fact a certain number of political communities, which are not yet States in the modern sense of the word, hold with the members of the international society numerous relations. Such are China, Persia, the kingdom of Siam, Morocco, to mention a few instances. Their relations became especially developed in the latter part of the 19th century, by the establishment at the same time of permanent embassies and by the entry into international unions of

(1) James Lorimer, *The Institutes of the law of Nations*, vol. I, p. 102.

which the field of action was constantly enlarging and which extended to almost all the regions of the globe, attaching political communities to one another by judicial links, imposing strict duties, creating in correlation with these duties numerous rights, causing governments and peoples to lead a more active life, rendering them more sociable, facilitating reconciliations, and making the contacts of international life even a want and a necessity (1). We must, moreover, insist on the fact that no political community suffers any indignity on its admission in the international society. Neither race nor religion can form any obstacles; only one condition is necessary, it is that the political institutions offer sufficient guarantees of order and stability, and assure the application of the law, and that the directors and members of the community desire to respect the conventions that it has concluded with other communities. It is more than a quarter of a century since David Dudley Field, occupying himself with the possibility of an opportunity for extending international law in its full force over all the States and all the communities of the earth, declared that all arrangements concluded in a common interest, which form the subject of so many modern treaties, are applicable to all nations, western or eastern, Christian or Pagan, for a greater or less extent according to the degree of the relations. « All measures, » he said, « conceived for the preservation of peace, and which are suited to the most advanced nations are not less suited to those who are backward. All the rules of international law relative to the exercice of the right of war are equally appli-

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(1) E. Nys, *Etudes de droit international et de droit politique*, 2e série, p. 42.

cable to all nations, to those who are the most enlightened as well as to those who are less so (1). »

The existence even of the State, its sovereignty, its independence, its liberty, do not at all depend on the good pleasure of other States nor consequently of its admission into the international society. It is a fundamental principle. The sovereignty, the independence, the freedom of a State commence with the very origin of the political society of which it is formed, or when it was separated from the society of which it previously formed part.

Some historical examples are interesting. They are numerous; we choose the most typical.

On 4th July 1776 the representatives of the United States of America, assembled in general Congress, solemnly proclaimed and declared that the colonies were, and by law should be free and independent States; that they were free and exempt from all obedience to the British Crown; that all political connection between them and Great Britain was and should be dissolved, and that by the title of free and independent States they were fully authorised to make war, to conclude peace, to form alliances, to establish trade regulations, to do all other acts, and to regulate all other matters that belonged to independent States.

On 17th September 1776, the Congress took into consideration « a plan of treaties to be submitted to foreign nations, » and it adopted the proposal for a treaty to be concluded with the King of France. On 6th February 1778 two treaties were concluded between the King of France and the thirteen united States of North America. One was a treaty of friendship and

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(1) David Dudley Field, *De la possibilité d'appliquer le droit international européen aux nations orientales.* Revue de droit international et de législation comparée, t. VII, p. 616.

commerce; the other a treaty of alliance in case Great Britain, resenting the bond just established by the treaty of friendship and commerce, should break the peace with France either by direct hostilities, or by placing obstacles in the way of commerce and navigation. The treaty of friendship and commerce, we may note, enclosed a series of provisions which constituted so much progress, and several of which were much in advance of the politics and the practice of the epoch, as for instance concerning the *droit d'aubaine*, the most favoured nation clause, contraband of war, privateering, the concession of free ports, the right of search, the maxim that trade follows the flag. The treaty of alliance provided that the essential and direct object of the alliance was to maintain in an effective manner the freedom, the sovereignty, and the absolute and unlimited independence of the United States. A secret article reserved to the King of Spain the power of acceding to the treaty of friendship and commerce as well as to that of alliance at the moment when he judged it to be suitable.

Treaties of friendship and commerce were concluded in 1782 with the United Provinces; in 1783, with Sweden. On 30th November 1782 the provisional articles of peace between Great Britain and the United States were signed at Paris, articles which should not have any force, and which were not to be exchanged into a definitive treaty until peace had been concluded between Great Britain and France. Peace was signed between Great Britain, France and Spain on 13th August 1783, and on 3rd September of the same year the definitive treaty of peace was concluded between England and the United States. George III recognised that the United States of America were free, sovereign and independent States; he treated with them as with free sovereign and independent

States, and for himself, his heirs, and successors he abandoned all pretensions to the government, propriety and territorial rights of or over those States.

A passage from a diplomatic document entitled « Statement of the motives of the King of France's action relative to England in 1779, » justifies the policy of the Cabinet of Versailles. « The proceedings of the Court of London » it is there said « forced its ancient colonies to have recourse to arms to maintain their rights, privileges and liberty. Every one knows the period when that event occurred; the repeated and fruitless efforts of the Americans to return to the mother country; the manner in which England repelled them; finally the act of Independence which was and ought to have been the result of it. The state of war in which the United States of North America necessarily found themselves in regard to England obliged them to secure for themselves a road to reach the other Powers of Europe, and to open a direct trade with them. The King would have betrayed the most essential interests of his kingdom if he had refused to admit them into his ports, and to allow them to share in the advantages enjoyed by all the other nations. »

The United States never were willing to date their existence as a sovereign State from any other moment than that when their general Congress of 1776 declared that the united Colonies were, and by law should be, free and independent States, free and exempt from all obedience to the British Crown. Their courts of justice have affirmed this fundamental principle; their diplomatists and their statesmen have proclaimed it on all occasions. At the Berlin Conference of 1884-1885 it was acknowledged that if, for the occupation of territories, the diplomatic notification gave rise to no protest, it need not be neces-

sarily followed by either an immediate or subsequent recognition. The motive was given. « The first plenipotentiary of the United States, » wrote M. Engelhardt one of the French delegates, « insisted particularly on this restriction which had for his Government the import of a capital principle. It is known in fact that by an order of 1808 the Supreme Court of the Federal Union decided that the sovereignty of that union existed since 4th July 1776, the day on which the States composing it declared themselves free, and that it was absolutely independent of the recognition by the King of England stipulated for by the treaty of peace of 1783 (1). »

The teaching of the science of international law is in conformity on this point with the lessons of history. « International law, » writes Bluntschli, « does not create new states, but it unites the States existing at the same period by common laws and principles based on justice and humanity (2). » « The existence of the sovereign State is, » says Rivier, « independent of its recognition by other States. This recognition is the proving of the accomplished fact, and it is also its approbation. It is the legitimation of a position of fact, which is thenceforth founded in law. It is the attestation of the confidence which the States have in the stability of the new order of things. In the society of nations it is the assurance given to the new State that it will be permitted to keep its place and its rank, as being an independent political organism among the associated nations. Recognition

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(1) Ed. Engelhardt, *Étude sur la déclaration de la Conférence de Berlin relative aux occupations*, Revue de droit international et de législation comparée, t. XVIII, p. 435.

(2) Bluntschli, *Le droit international codifié*, traduction par C. Lardy, art. 23.

implies a formal engagement to respect in the new person of the law of nations the rights and attributions of sovereignty. These rights and attributions belong to it independently of the recognition, but it is only after recognition that, it has their assured exercise. Regular political relations exist only between States which recognise one another (1).» Perhaps it is right to make an observation and to note that the question of the recognition of a new State is different from that of the recognition of a new Government. In one case there is in fact the accession of a new member to the Society of States; in the other there is the authentication of the fact that a new Government is the authorised representative of the national will, the depository of the sovereign power (2).

In the life of peoples, in their incessant competitions, in their quarrels and in their wars, as well as in their peaceful transactions, there may be a capital interest in authenticating at what precise moment the new State was born. A sufficient number of cases have occurred. Jurists have never confounded the moment of the birth of a State with that of its recognition, and every time that the question has been raised in international law, it has been decided in the sense of the priority of the fact of the State's existence over the simple manifestation of the will of the other States which constitutes the recognition.

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(1) Rivier, *Principes du droit des gens*, t. Ier, p. 57.

(2) Antoine Rougier, *Les guerres civiles et le droit des gens*, 1903, pp. 499 et 500.

III

These preliminary indications have seemed to us to serve a useful purpose. Let us now closely examine how the Independent State of the Congo came into existence, and in what manner it made its accession to the society of States.

When were the essential elements of all States found combined in the vast territories now possessed by the Independent State of the Congo? Was it before the Berlin Conference? Was it by the express will or pleasure of that Conference? That is the problem before us.

It offers indeed both interest and importance, for the solution which some writers wish to give it would diminish and almost annihilate the sovereignty of the Independent State.

In the minds of many persons, the Independent State is the creation of the Conference of 1884-5. The affirmation of this was made in the English House of Commons on the 20th May last. « The Independent State of the Congo, » said Mr. H. L. Samuel, « was created by the common consent of the Great Powers, and was allotted not to a country but to an individual, the King of the Belgians. » Let us call attention to the error committed in making the Berlin Conference in which the delegates of fourteen States took part, an assembly of the delegates of the Great Powers. But must not the argument supported by Mr. H. L. Samuel, and adopted by a great part of the English press, lead to the conclusion that the Governments signatories of the General Act of 26th February 1885 can at their wish correct and modify their work? Is it not equivalent to granting them not

only the right to superintend the « juridical person » that they have called into existence, but the right to suppress that « juridical person? »

Such as a matter of fact is the object. It is to invest some Powers not only with a simple right of jurisdiction, but with the right of life and death. It is to conceive a theory which would permit their forming themselves into a tribunal, and summoning another State, and to decide in regard to it not according to the principles of justice, but upon considerations dictated by a badly understood and falsely inspired mercantile interest.

IV

Rivier defined the State, considered from the point of view of the law of nations as, « an independent community organised in a permanent manner upon a territory. » « The State is a community » he teaches, « not a more or less fortuitous aggregation of individuals, but an union of families sufficiently numerous to suffice among themselves, to exist and to continue... The State is an independent, that is to say a sovereign community. It must have its own existence, be master of its actions. It is an organised community. For a State to exist, a Government, a collective will binding the citizens, is necessary. The State must have a territory, a fixed position, *certa sedes,* on a portion geographically determined of the globe. These different conditions must be united not momentarily and accidentally, but in a permanent manner. Territory and population, collective will and government, independence and permanence, these are the essential elements of the State, moral

organism and personality, subject of the law of nations (1). »

On a few points there are here some slight criticisms to make. Thus the words « independent » and « sovereign » do not at all signify the same thing. In the primitive sense the term « sovereignty » designated in the science of public law the character of the person whose feudal lordship did not depend on any other superior lordship, and it was in the last half of the 16th century and at the beginning of the 17th that it was used to qualify the power itself of the King. In our time sovereignty is the quality of a State by virtue of which nothing is decided except by its own, and uncontrolled pleasure. The word « independence » also possesses its technichal significance (2). Besides important publications on the science of public law remove all doubt.

As we have already pointed out in another study, a recent doctrine has modified the characteristics of the

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(1) Rivier, *Principes du droit des gens*, t. I^er^, pp. 45-46.

(2) On 20th November 1815 the plenipotentiaries of Austria, France, Great Britain, Portugal, Prussia and Russia declared that they recognised authentically that the neutrality and inviolability of Switzerland, and its « independence of all foreign influence » were in the true interests of European policy. There we have the sense of the word « independence » clearly defined. On 7th June 1832 France, Great Britain and Russia arranged by the treaty of London that Greece, under the sovereignty of Prince Otho of Bavaria, and the guarantee of the three signatory Powers, should form an independent monarchical State as was set forth in the Protocol signed 3rd February 1830. The word « independence » implied solely the right to exercise sovereign power. In 1841 the French Government proposed « the recognition and integrity » of the Ottoman Empire. In 1856 the famous text of article 7 of the treaty of Paris of 30th March contains at full length the engagement to respect « the independence and territorial integrity of the Ottoman Empire. »

State (1). According to the most eminent jurists the characteristics of a State are territory, subjects and the right of domination. But they pretend that the right of domination is not destroyed by the fact that there is submission to another legal power. As soon as there is a right of domination they say there is the power of a State, and hence there is a State. Nothing prevents the vassal State from being a State. We have already summarised the theory of Laband, which goes back moreover to the studies of Gerber. Here is a reproduction of it. « The right of domination, » says the eminent jurist, « is the right of ordering free persons and communities to perform acts, abstentions, prestations, and to compel them to comply with these orders. Every State, even the smallest, has a right of domination. No other collective body possesses it. From this essential difference springs the opposition between public, and private rights. Private law knows nothing of dominion except over things; towards free persons it knows only rights of credit which include no right of coercion against the debtor since in the statements of obligation creditors and debtors are on a footing of equality (2). » « In the law as it is, » adds Laband, « putting aside the feeble tie which exists in the legal power of the father and of the husband, there is neither private subordination nor private power. The State alone rules men. Its will alone has the power to override the wills of individuals, to dispose of their goods, of their liberty, and of their life. »

Let it not be lost to sight that beside sovereign

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(1) E. Nys, *L'État et la notion de l'État*, Bulletin de l'Académie royale de Belgique, classe des lettres, 1901, p. 1067.

(2) Laband, *Le droit public de l'empire allemand*, t. I^er^, traduction de M. Gandilhon, p. 119.

States, international law places semi-sovereign or vassal States, and protected States. An eminent jurist has gone beyond this. He has applied himself to showing in the present organisation of the world the existence of a whole category of true political « formations » subject to the power of a State, but in no way to be confounded with that State. These « formations » are not States; they are fragments of a State. They constitute neither complete States nor parts of a complete State, nor communal or provincial institutions (1). Still more, writers have taxed their ingenuity to show international law itself confronted with « rudimentary beings », with « belligerent communities, » in which they recognise juridical persons, and who are, in fact, insurgent parties that have obtained during civil war the recognition of belligerent rights (2).

V

Some dates govern our subject.

On 12th September 1876 H. M. Leopold II. invited at the Palace of Brussels the geographical conference which decided on 14th September to constitute « an international commission for the exploration and civilisation of Central Africa, and national committees which held themselves in relationship with the commission with the object of centralising as much as possible the efforts made by their countrymen, and to

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(1) JELLINEK, *Staatsfragmente* in the *Festgabe*, published in 1896 by the Faculty of Law of Heidelberg in honour of the Grand Duke of Baden.

(2) ANTOINE ROUGIER, *op. cit.*, p. 12. The appellation is that of M. Wiesse author of the interesting book, *Le droit international appliqué aux guerres civiles*, 1898.

facilitate by their cooperation the execution of the resolutions of the commission. »

On the same date of 14th September the geographical Conference bestowed on the King of the Belgians the presidency of the International Commission. It formed an executive committee which was to assist the President, and it was composed of Sir Bartle Frere for Great Britain, of Dr. Nachtigal for Germany and of M. Quatrefages for France.

National committees were formed in different countries. The one that displayed special activity was the « National Belgian Committee of the International African Association. » Its creation was on 6th November 1876.

On 21st June 1877 the International Commission of the African Association took into consideration the choice of a flag. On 20th June it had been decided that the Association could not adopt any flag belonging either to a nation or to another association. On 21st June it was at first proposed to take as an ensign the Belgian lion; then a member suggested the image of the sphinx as an allusion to the enigma of Africa; but the choice fell on the blue flag ornamented with a golden star.

In October 1877, a Belgian expedition was sent to the east coast of Africa.

Other missions were soon organised and followed to penetrate to the heart of Africa. On 25th November 1878 the Committee for studying the Upper Congo was founded. It was to turn to account the discoveries of Henry Stanley. A new expedition was decided upon. Stanley, who directed it, left Europe on 23rd January 1879; on 14th August of the same year he arrived at the mouth of the Congo where was assembled a flotilla sent out by the Committee for studying the question, and on

21st August 1879 the illustrious explorer ascended the river.

In 1882 the International Association of the Congo was founded.

The facts themselves, the courageous efforts made to gain for civilisation these immense territories, the struggles at every moment, the sufferings and sacrifices, should be committed to memory; but the task would be long, and would exceed the limits of our space. The questions of law suffice for these pages.

Two problems presented themselves. One concerned the acquisition of territories in international law, the other was relative to the import of the cessions made by the chiefs of tribes or by the tribes themselves.

It was frequently on a territory inhabited by tribes. According to the principles of the modern law of nations, a solution had to be found. There could not have been there occupation pure and simple. The taking possession had to be done with the consent of the native authority. This consent itself must be free, done with knowledge, and according to the usages of the country (1).

In reality an appropriation as the result of a treaty was required; a cession was necessary.

Thus nearly a hundred conventions were concluded by Henry Stanley and by his agents. The native chiefs recognised the sovereignty of the International Association, they adopted its flag, they accepted for themselves and their successors the decisions of its representatives relative to their well-being, or to their properties.

Did such cessions as these invest the International

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(1) Gaston Jèze, *Étude théorique et pratique sur l'occupation*, 1896, p. 115.

Association with the power of a State? Learned opinions from Sir Travers Twiss and Égide Arntz gave an affirmative solution to the problem. They were based on history and on the principles of law. They proclaimed the truth (1). At the present time there is no more than an academic interest in disserting on this point. Let us say, however, that in the law of nations the cession made by the uncivilised confers in a perfect degree the sovereignty. « The object of acquisition, » M. Jèze observes « is not the sovereignty as it is exercised by the barbarous State, but the sovereignty as it might be exercised by any State whatever. In private law the purchaser of an estate does not succeed only to the rights exercised by the vendor, but also to all those that he could have exercised, and that is also true in international public law. To pretend the contrary is to confound the actual exercise of a right, and the possible exercise of the same right. Over and above this might it not be sustained with some show of reason that the concessionaire State acquired from the barbarian sovereign more right than he will ever think of exercising? Sovereignty as understood by primitive peoples, has it not the maximum of attributes, since it most often comprehends the right of life and death over subjects, and the right of proprietorship over all their goods? (2). »

Besides at the very moment when this argument was being discussed, an important act had just given considerable support to the International Association, and testified its rank as sovereign power. In his annual

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(1) The opinions of Sir Travers Twiss and Égide Arntz are to be found reproduced at the end of the interesting report made to the Senate of the United States by Mr. Morgan on 26th March 1884.

(2) Gaston Jèze, *op. cit.*, p. 119.

message to Congress the President of the United States raised the question of the relations which were henceforth to be established between the Republic and « the inhabitants of the Congo valley in Africa. » On 26th May 1884 Mr. Morgan reported to the Senate in the name of the Committee for foreign affairs.

On 18th January 1884 a communication from Mr. Frelinghuysen, secretary of the State Department, explained to Mr. Morgan how along the Congo the African International Association had created important establishments. On 13rd March of the same year a further communication from Mr. Frelinghuysen set forth the opportuneness and the usefulness of recognising the flag of the Association, and added that no principle of international law was opposed to the creation of a State by a philanthropical society.

In his report of 26th March Mr. Morgan recalled the fact that Stanley had concluded at Vivi on 13th June 1880 the first convention with a native chief, and that since that date nearly a hundred other treaties between tribal chiefs and the agents of the Association had been concluded, in which important commercial arrangements and stipulations relative to law, the maintenance of order, and the delegation of power figured among the provisions. Consequently two hypotheses presented themselves. « If the local rulers, » said Mr. Morgan, « were qualified to make the cession they did, the sovereign power that they conferred on the African International Association might obtain recognition on the part of other nations precisely because that Association thus proves its existence as a Government by law. » « If, » he added, « there exists any doubt concerning the sovereignty or the territory or the subjects, the understanding among the native tribes who conclude treaties with the Association

offers a sufficient guarantee to other peoples for recognising the Association as a Government in fact. »

The Committee of foreign affairs made a motion in favour of the recognition of the Association. It is permissible to affirm that at this moment a juridical person already existed, which could claim the principal rights of a State, and which found itself prepared to fulfil the duties of one. The first direction of the efforts of the Committee for studying the Upper Congo had been indicated in July 1879 in the instructions given to Stanley. « It would be wise, » wrote Colonel Strauch, « to extend the influence of the stations over the chiefs and tribes inhabiting the neighbourhood. There might be made out of them a republican confederation of free negroes, an independent confederation under this reservation that the King, to whom its conception and creation would be due, should nominate its President who was to reside in Europe.... A confederacy thus formed might of its own authority grant concessions to companies for the construction of works of public utility, or issue loans as Liberia and Sarawak do, and also execute itself public works. Our enterprise does not tend to the creation of a Belgian Colony but to the establishment of a powerful negro state (1). » But the political idea was not slow in taking a precise form. If in Mr. Morgan's report there is still question of *the Free States of the Congo* the conclusion did not the less relate, as we have just seen, to the African International Association.

It was it which was, according to the Committee of Foreign Affairs of the Senate, in law or in fact a « Government » qualified to claim international recognition.

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(1) F. Cattier, *Droit et administration de l'État indépendant du Congo*, 1898, p. 17.

VI

Besides the solution was very soon effected. The Government of the United States recorded the existence of « the International Association of the Congo, managing the interests of the Free States established in that region and gave orders to all United States officials on sea and on land to recognise the flag of the International Association as the equal of that of a friendly Government. » The following is the text of the declarations which were exchanged on 22nd April 1884 :—

The International Association of the Congo hereby declares that by Treaties with the legitimate Sovereigns in the basins of the Congo and of the Niadi-Kialum and in adjacent territories upon the Atlantic there has been ceded to it territory for the use and benefit of Free States established and being established under the care and supervision of the said Association in the said basins and adjacent territories to which cession the said Free States of right succeed.

That the said International Association has adopted for itself and for the said Free States, as their standard, the flag of the International African Association, being a blue flag with a golden star in the centre.

That the said Association and the said States have resolved to levy no custom-house duties upon goods or articles of merchandize imported into their territories or brought by the route which has been constructed around the Congo cataracts; this they have done with a view of enabling commerce to penetrate into Equatorial Africa.

That they guarantee to foreigners settling in their territories the right to purchase, sell, or lease lands and buildings situated therein; to establish commercial houses, and to carry on trade upon the sole condition that they shall obey the laws. They pledge themselves, moreover, never to

grant to the citizens of one nation any advantages without immediately extending the same to the citizens of all other nations, and to do all in their power to prevent the Slave Trade.

In testimony whereof, Henry S. Sanford, duly empowered therefor by the said Association, acting for itself and for the said Free States, has hereunto set his hand and affixed his seal this 22nd day of April, 1884, in the city of Washington.

(L. S.) (Signed) H. S. Sanford.

Frederick T. Frelinghuysen, Secretary of State, duly empowered therefor by the President of the United States of America, and pursuant to the advice and consent of the Senate, heretofore given, acknowledges the receipt of the foregoing notification from the International Association of the Congo, and declares that, in harmony with the traditional policy of the United States, which enjoins a proper regard for the commercial interests of their citizens, while at the same time avoiding interference with controversies between other Powers as well as alliances with foreign nations, the Government of the United States announces its sympathy with, and approval of, the humane and benevolent purposes of the International Association of the Congo, administering, as it does, the interests of the Free States there established, and will order the officers of the United States, both on land and sea, to recognize the flag of the International African Association as the flag of a friendly Government.

In testimony whereof he has hereunto set his hand and affixed his seal this 22nd day of April A.D. 1884, in the city of Washington.

(L. S.) (Signed) Frederick T. Frelinghuysen.

The International Association was acting moreover as a person of the law of nations. On 23rd April it made the declaration to France by which it bound itself to give her the right of preference if through unforeseen circumstances it should be compelled at any time to dispose of its possessions. On 24th April the French Government took note of this declaration, and

bound itself to respect the stations and free territories of the Association, and not to put any obstacles in the way of the exercise of its rights.

On 8th November 1884 a convention was concluded between the German Empire and the Association. The following are its terms :—

1. The International Association of the Congo engages not to levy any duty on articles or merchandize imported directly or in transit into its present or future possessions in the basins of the Congo and the Niadi-Kwilu, or into its possessions situated on the Atlantic Ocean. This exemption from duties especially applies to merchandize and articles of commerce which are carried by the roads made round the cataracts of the Congo.

2. The subjects of the German Empire shall have the right of sojourning and of establishing themselves on the territories of the Association. They shall be treated on the same footing as the subjects of the most favoured nation, including the inhabitants of the country, so far as concerns the protection of their persons and possessions, the free exercice of their religion, the recognition and defence of their rights, as well as in matters of navigation, trade, or manufactures.

Especially, they shall have the right of buying, selling, and leasing lands and buildings situated in the territories of the Association, of establishing commercial houses, and carrying on trade or the coasting trade under the German flag.

3. The Association engages never to grant any privileges whatsoever to the subjects of any other nation without their being immediately extended to German subjects.

4. In the event of the cession of the present or future territory of the Association, or of any part of it, the obligations contracted by the Association towards the German Empire shall be transferred to the occupier. These obligations and the rights granted by the Association to the German Empire and its subjects shall remain in force after every cession as far as regards each new occupier.

5. The German Empire recognizes the flag of the Asso-

ciation – a blue flag with a golden star in the centre – as that of a friendly State.

6. The German Empire is ready on its part to recognize the frontiers of the territory of the Association and of the new State which is to be created, as they are shown in the annexed Map.

7. This Convention shall be ratified and the ratifications shall be exchanged with the least possible delay.

This Convention shall come into force immediately after the exchange of the ratifications.

Done at Berlin the 8th November, 1884.

(Signed) Count v. Brandenbourg.
Strauch.

Is it necessary to insist on these dates? It may be affirmed that at the moment when the United States resolved to recognise the Association there was not even a question of the meeting of an international Conference about African questions. On the other hand when the German Empire concluded the convention of 8th November 1884 the Berlin Conference had not yet assembled, and still the Empire « recognised » the flag of the Association as that of a friendly « State. » Is this conclusive? Can a more formal proof be imagined of the existence of the State before the General Act of 26th February 1885?

The Conference of Berlin comprised the representatives of fourteen Powers: Germany, Austria-Hungary, Belgium, Denmark, Spain, United States of America, France, Great Britain, Italy, Holland, Portugal, Russia, Sweden and Norway, and Turkey. It opened its labours on 5th November 1884 and terminated them on 26th February 1885.

Whilst it carried on its deliberations the work of the recognition of the Association as a State, as a Power, as a subject of the law of nations, never ceased towards becoming completed and finished.

On 16th December 1884 Great Britain and the International Association of the Congo exchanged declarations and concluded a Convention. The following is the declaration of the Association:—

The International Association of the Congo, founded by His Majesty the King of the Belgians for the purpose of promoting the civilization and commerce of Africa, and for other humane and benevolent purposes, hereby declares as follows:—

1. That by Treaties with the legitimate Sovereigns in the basins of the Congo and of the Niadi-Kwilu, and in adjacent territories upon the Atlantic, there has been ceded to it territory for the use and benefit of Free States established, and being established, in the said basins and adjacent territories.

2. That by virtue of the said Treaties, the administration of the interests of the said Free States is vested in the Association.

3. That the Association has adopted as its standard, and that of the said Free States, a blue flag with a golden star in the centre.

4. That with a view of enabling commerce to penetrate into Equatorial Africa, the Association and the said Free States have resolved to levy no customs duties upon goods or articles of merchandize imported directly into their territories or brought by the route which has been constructed around the cataracts of the Congo.

5. That the Association and the said Free States guarantee to foreigners established in their territories the free exercise of their religion, the rights of navigation, commerce, and industry, and the right of buying, selling, letting, and hiring lands, buildings, mines, and forests, on the sole condition that they shall obey the laws.

6. That the Association and the said free States will do all in their power to prevent the Slave Trade and to suppress slavery.

Done at Berlin, the 16th December, 1884.

(On behalf of the Association),
(Signed) STRAUCH.

The declaration of the British Government was as follows :—

The Government of Her Britannic Majesty declare their sympathy with, and approval of, the humane and benevolent purposes of the Association, and hereby recognize the flag of the Association, and of the Free States under its administration, as the flag of a friendly Government.

(On behalf of Her Majesty's Government),
EDWARD B. MALET.

The Convention itself was couched in the following terms : —

Whereas the Government of Her Britannic Majesty have recognized the flag of the International Association of the Congo, and of the free States under its administration, as the flag of a friendly Government;

And whereas it is expedient to regulate and define the rights of British subjects in the territories of the said free States, and to provide for the exercise of civil and criminal jurisdiction over them, in manner hereinafter mentioned, until sufficient provision shall have been made by the Association for the administration of justice among foreigners;

It is hereby agreed as follows :—

1. The International Association of the Congo undertakes not to levy any duty, import or transit, on articles or merchandize imported by British subjects into the said territories, or into any territory which may hereafter come under its government. This freedom from custom-house duties shall extend to merchandize and articles of commerce which shall be transported along the roads or canals constructed, or to be constructed, around the cataracts of the Congo.

2. British subjects shall have at all times the right of sojourning and of establishing themselves within the territories which are or shall be under the Government of the said Association. They shall enjoy the same protection which is accorded to the subjects or citizens of the most favoured nation in all matters which regard their persons, their property, the free exercise of their religion, and the

rights of navigation, commerce, and industry. Especially they shall have the right of buying, of selling, of letting, and of hiring lands and buildings, mines, and forests, situated within the said territories, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the British flag.

3. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being extended to British subjects.

4. Her Majesty the Queen of Great Britain and Ireland may appoint Consuls or other Consular Officers to reside at ports or stations within the said territories, and the Association engages itself to protect them.

5. Every British Consul or Consular officer within the said territories, who shall be thereunto duly authorized by Her Britannic Majesty's Government, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of British subjects within the same, in accordance with British law.

6. Nothing in the last preceding Article contained shall be deemed to relieve any British subject from the obligation to observe the laws of the said Free States applicable to foreigners, but any infraction thereof by a British subject shall be justiciable only by a British Consular Court.

7. Inhabitants of the said territories who are subject to the Government of the Association, if they shall commit any wrong against the person or property of a British subject, shall be arrested and punished by the authorities of the Association according to the laws of the said Free States.

Justice shall be equitably and impartially administered on both sides.

8. A British subject, having reason to complain against an inhabitant of the said territories, who is subject to the Government of the Association, must proceed to the British Consulate, and there state his grievance. The Consul shall inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if any such inhabitant of the said territories shall have reason to complain against a British subject, the British Consul shall no less listen to his complaint and endeavour to settle it in a friendly

manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the authorities of the Association to examine into the merits of the case and decide it equitably.

9. Should any inhabitant of the said territories, who is subject to the Government of the Association, fail to discharge any debt incurred to a British subject, the authorities of the Association will do their utmost to bring him to justice, and to enforce recovery of the said debt; and should any British subject fail to discharge a debt incurred by him to any such inhabitant, the British authorities will in like manner do their utmost to bring him to justice, and to enforce recovery of the debt. No British Consul nor any authority of the Association is to be held responsible for the payment of any debt contracted either by a British subject, or by any inhabitant of the said territories, who is subject to the Government of the Association.

10. In case of the Association being desirous to cede any portion of the territory now or hereafter under its Government, it shall not cede it otherwise than as subject to all the engagements contracted by the Association under this Convention. Those engagements, and the rights thereby accorded to British subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay. It shall come into operation immediately upon the exchange of ratifications.

Done at Berlin the 16th December, 1884.

(Signed) Edward Malet.
Strauch.

On 19th December, 1884 the following Convention was concluded between Italy and the Association :—

1. The International Association of the Congo undertakes not to levy any duty, import or transit, on articles or merchandize imported by Italian subjects into its present or future territories in the basins of the Congo and of the Niadi

Kwilu, or into its possessions situated on the borders of the Atlantic Ocean. This freedom from custom-house duties shall extend to merchandize and articles of commerce which shall be transported along the roads or canals constructed, or to be constructed, around the cataracts of the Congo.

2. Italian subjects shall have at all times the right of sojourning and of establishing themselves within the territories which are or shall be under the Government of the said Association. They shall enjoy the same protection which is accorded to the subjects or citizens of the most favoured nation, including the natives of the country, in all matters which regard their persons, their property, the free exercise of their religion, and the rights of navigation, commerce, and industry. Especially they shall have the right of buying, of selling, of letting, and of hiring lands, mines, and forests and buildings situated within the said territories, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Italian flag.

3. The Association engages itself never to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Italian subjects.

4. His Majesty the King of Italy may appoint Consuls or other Consular officers to reside at ports or stations within the said territories, and the Association engages itself to protect them there.

5. Every Italian Consul or Italian Consular officer within the said territories, who shall be thereunto duly authorized by His Italian Majesty's Government, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of Italian subjects within the same, in accordance with Italian law.

6. Nothing in the last preceding Article contained shall be deemed to relieve any Italian subject from the obligation to observe the laws of the said Free States applicable to foreigners, but any infraction thereof by an Italian subject shall be justiciable only by an Italian Consular Court.

7. Inhabitants of the said territories who are subject to the Government of the Association, if they shall commit any wrong against the person or property of an Italian subject, shall be arrested and punished by the authorities of the

Association according to the laws of the said Free States.

Justice shall be equitably and impartially administered on both sides.

8. An Italian subject, having reason to complain against an inhabitant of the said territories, who is subject to the Government of the Association, must proceed to the Italian Consulate, and there state his grievance. The Consul shall inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if any such inhabitant of the said territories shall have reason to complain against an Italian subject, the Italian Consul shall no less listen to his complaint and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Italian Consul cannot arrange them amicably, then he shall request the assistance of the authorities of the Association to examine into the merits of the case and decide it equitably.

9. Should any inhabitant of the said territories, who is subject to the Government of the Association, fail to discharge any debt incurred to an Italian subject, the authorities of the Association will do their utmost to bring him to justice, and to enforce recovery of the said debt; and should any Italian subject fail to discharge a debt incurred by him to any of the inhabitants, the Italian authorities will in like manner do their utmost to bring him to justice, and to enforce recovery of the debt.

No Italian Consul nor any authority of the Association is to be held responsible for the payment of any debt contracted either by an Italian subject, or by any inhabitant of the said territories, who is subject to the Government of the Association.

10. In case of the Association ceding any portion of the territory now or hereafter under its Government, all the engagements contracted by the Association under this Convention shall be binding on the concessionaires Those engagements, and the rights thereby accorded to Italian subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

11. The Association and the Free States undertake to do all in their power to prevent the Slave Trade and suppress slavery.

12. The Italian Government, sympathizing with and approving the humanizing and civilizing aim of the Association, recognizes the flag of the Association and of the Free States placed under its Government—a blue flag with a gold star in the centre—as the flag of a friendly Government.

13. This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay.

14. This Convention shall come into operation immediately after the exchange of the ratifications.

In testimony of which the respective Plenipotentiaries have hereunto affixed their seals and signatures.

Done at Berlin the 19th December, 1884.

(Signed) STRAUCH.
LAUNAY.

The declarations exchanged between the Government of Austria-Hungary and the International Association of the Congo was dated 24th Dec. 1884.

1. The International Association of the Congo undertakes not to levy any duty on articles of commerce or merchandize imported directly or in transit into its present or future possessions in Africa. This freedom from duties shall specially extend to merchandize and articles of commerce which shall be transported along the roads of communication constructed around the cataracts of the Congo.

2. Austro-Hungarian subjects shall have the right of sojourning and of establishing themselves on the territories of the Association. They shall enjoy the same treatment which is accorded to the subjects or citizens of the most favoured nation, including the inhabitants of the country, in matters which regard the protection of their persons, their property, the free exercise of their religion, the assertion and defence of their rights, and the rights of navigation, commerce and industry. Especially they shall have the right of buying, of selling, and of hiring lands and buildings situated within the territories of the Association, and of founding houses of commerce, and of

carrying on commerce and a coasting trade under the Austro-Hungarian flag.

3. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Austro-Hungarian subjects.

It is understood that Austria-Hungary shall enjoy, in regard to the nomination of Consuls, their functions and Consular jurisdiction, all the rights and privileges which may be granted to any other State.

4. In case of the cession of the present or future territory of the Association, or any part of it, the engagements contracted by the Association towards Austria-Hungary shall be binding on the concessionaire. Those engagements, and the rights accorded by the Association to Austria-Hungary and its subjects, shall continue to be in vigour after every cession made to any new occupant.

5. Austria-Hungary, taking cognizance of the above engagements and sympathizing with the humane aims of the Association, recognizes its flag—a blue flag with a gold star in the centre—as that of a friendly State.

Done at Berlin the 24th December, 1884.

(Signed) STRAUCH.
SZÉCHÉNYI.

The Convention concluded with the Netherlands Government was dated 27th December 1884.

1. The International Association of the Congo undertakes not to levy any duty, import or transit, on articles or merchandize imported by Dutch subjects into the present or future possessions of the Association. This freedom from custom-house duties shall extend to merchandize and articles of commerce which shall be transported along the roads or canals constructed, or to be constructed, around the cataracts of the Congo.

2. Dutch subjects shall have at all times the right of sojourning and of establishing themselves within the territories which are or shall be under the Government of the said Association. They shall enjoy the same protection which

is accorded to the subjects or citizens of the most favoured nation in all matters which regard their persons, their property, the free exercise of their religion, and the rights of navigation, commerce, and industry. Especially they shall have the right of buying, of selling, of letting, and of hiring lands and buildings, mines, and forests, situated within the said territories, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Dutch flag.

3. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Dutch subjects.

4. His Majesty the King of the Netherlands may appoint Consuls or other Consular officers to reside at ports or stations within the said territories, and the Association engages itself to protect them.

5. Until a form of judicial procedure has been organized in the Free States of the Congo, and such organization has been notified by the Association, every Dutch Consul or Consular Officer within the said territories, who shall be thereunto duly authorized by the Government of His Majesty the King of the Netherlands, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of Dutch subjects within the same, in accordance with Dutch law.

6. Nothing in the last preceding article contained shall be deemed to relieve any Dutch subject from the obligation to observe the laws of the said Free States applicable to foreigners, but any infraction thereof by a Dutch subject shall be justiciable only by a Dutch Consular Court.

7. Inhabitants of the said territories who are subject to the Government of the Association, if they shall commit any wrong against the person or property of a Dutch subject, shall be arrested and punished by the authorities of the Association according to the laws of the said Free States.

Justice shall be equitably and impartially administered on both sides.

8. A Dutch subject, having reason to complain against an inhabitant of the said territories, who is subject to the

Government of the Association, must proceed to the Dutch Consulate, and there state his grievance. The Consul shall inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if any such inhabitant of the said territories shall have reason to complain against a Dutch subject, the Dutch Consul shall no less listen to his complaint and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the authorities of the Association to examine into the merits of the case and decide it equitably.

9. Should any inhabitant of the said territories, who is subject to the Government of the Association, fail to discharge any debt incurred to a Dutch subject, the authorities of the Association will do their utmost to bring him to justice, and to enforce recovery of the said debt; and should any Dutch subject fail to discharge a debt incurred by him to any such inhabitant, the Dutch authorities will in like manner do their utmost to bring him to justice, and to enforce recovery of the debt. No Dutch Consul nor any authority of the Association is to be held responsible for the payment of any debt contracted either by a Dutch subject, or by any inhabitant of the said territories, who is subject to the Government of the Association.

10. In case of the Association ceding the territory now or hereafter under its Government. or any part of it, all the engagements contracted by the Association under this Convention shall be binding on the concessionaires. Those engagements, and the rights thereby accorded to Dutch subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

11. The Association and the Free States undertake to do all in their power to prevent the Slave Trade and suppress slavery.

12. The Government of the Netherlands, sympathizing with the humanizing and civilizing aims of the Association, recognizes the flag of the Association and of the Free States placed under its administration—a blue flag with a gold star in the centre—as the flag of a friendly Government.

13. This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay. It

shall come into operation immediately upon the exchange of ratifications.

Done at Brussels the 27th December, 1884.

(Signed) STRAUCH.
L. GERICKE.

The Convention with Spain bears the date of 7th January, 1885 :—

1. The International Association of the Congo undertakes not to levy any duty, import or transit, on articles or merchandize imported by Spanish subjects into the actual or future territories of the Association. This freedom from duties shall extend to merchandize and articles of commerce which shall be transported along the roads or canals constructed, or to be constructed, around the cataracts of the Congo.

2. Spanish subjects shall have at all times the right of sojourning and of establishing themselves within the territories which are or shall be under the Government of the said Association. They shall enjoy the same protection which is accorded to the subjects or citizens of the most favoured nation in all matters which regard their persons, their property, the free exercise of their religion, and the rights of navigation, commerce, and industry. Especially they shall have the right of buying, of selling, of letting, and of hiring lands and buildings, mines, and forests, situated within the said territories, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Spanish flag.

3. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Spanish subjects.

4. His Catholic Majesty may appoint Consuls or other Consular officers to reside at ports or stations within the said territories, and the Association engages itself to protect them.

5. Until a form of judicial procedure has been organized in the Free States of the Congo, and such organization

has been notified by the Association, every Spanish Consul or Consular officer within the said territories, who shall be thereunto duly authorized by His Catholic Majesty's Government, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of Spanish subjects within the same, in accordance with Spanish law.

6. Nothing in the last preceding Article contained shall be deemed to relieve any Spanish subject from the obligation to observe the laws of the said Free States applicable to foreigners, but any infraction thereof by a Spanish subject shall be justiciable only by a Spanish Consular Court.

7. Inhabitants of the said territories who are subject to the Government of the Association, if they shall commit any wrong against the person or property of a Spanish subject, shall be arrested and punished by the authorities of the Association according to the laws of the said Free States.

Justice shall be equitably and impartially administered on both sides.

8. A Spanish subject, having reason to complain against an inhabitant of the said territories, who is subject to the Government of the Association, must proceed to the Spanish Consulate, and there state his grievance. The Consul shall inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if any such inhabitant of the said territories shall have reason to complain against a Spanish subject, the Spanish Consul shall no less listen to his complaint and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the authorities of the Association to examine into the merits of the case and decide it equitably.

9. Should any inhabitant of the said territories, who is subject to the Government of the Association, fail to discharge any debt incurred to a Spanish subject, the authorities of the Association will do their utmost to bring him to justice, and to enforce recovery of the said debt; and should any Spanish subject fail to discharge a debt incurred by him to any such inhabitant, the Spanish

authorities will in like manner do their utmost to bring him to justice, and to enforce recovery of the debt. No Spanish Consul nor any authority of the Association is to be held responsible for the payment of any debt contracted either by a Spanish subject, or by any inhabitant of the said territories, who is subject to the Government of the Association.

10. In case of the Association ceding any portion of the territory now or hereafter under its government, all the engagements contracted by the Association under this Convention shall be binding on the concessionaires. Those engagements, and the rights thereby accorded to Spanish subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

11. The Association and the Free States undertake to do all in their power to prevent the Slave Trade and suppress slavery.

12. The Spanish Government, sympathizing with the humanizing and civilizing aims of the Association, recognize the flag of the Association and of the Free States placed under its administration—a blue flag with a gold star in the centre—as the flag of a friendly Government.

13. This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay. It shall come into operation immediately upon the exchange of ratifications.

In testimony of which the respective Plenipotentiaries have hereunto affixed their seals and signatures.

Done at Brussels the 7th January, 1885.

(Signed) Comte Paul de Borchgrave d'Altena.
Rafael Merry del Val.

On 5th February 1885 was concluded a Convention with the French Republic.

1. The International Association of the Congo hereby declares that it extends to France the privileges it has conceded to the United States of America, the German Empire, England, Italy, Austria-Hungary, the Netherlands, and Spain, in virtue of the Conventions wihch it concluded with those Powers respectively on the 22nd April, 8th No-

vember, 16th, 19th, 24th, and 29th December, 1884, and 7th January, 1885, the text of which is annexed to the present Convention.

2. The Association engages moreover never to grant any privileges whatever to the subjects of any other nation without their being immediately extended to French citizens.

3. The Government of the French Republic and the Association adopt as frontiers between their possessions :—

The River Chiloango from the ocean to its northernmost source;

The water-parting of the waters of the Niadi Quilloo and the Congo as far as beyond the meridian of Manyanga;

A line to be settled, which, following as far as possible some natural division of the land, shall end between the station of Manyanga and the cataract of the Ntombo Mataka, at a point situated on the navigable portion of the river;

The Congo up to Stanley Pool;

The centre of Stanley Pool;

The Congo up to a point to be settled above the River Licona-Nkundja;

A line to be settled from that point to the 17th degree of longitude east of Greenwich, following, as closely as possible, the water-parting of the basin of the Licona-Nkundja, which is part of the French possessions;

The 17th degree of longitude east of Greenwich.

4. A Commission, composed of an equal number on each side of Representatives of the two parties, shall be intrusted with the duty of marking out on the spot a frontier-line in conformity with the preceding stipulations. In case of a difference of opinion, the question shall be settled by Delegates, who shall be named by the International Commission of the Congo.

5. Subject to the arrangements to be made between the International Association of the Congo and Portugal as to the territories situated to the south of the Chiloango, the Government of the French Republic is disposed to recognize the neutrality of the possessions of the International Association comprised within the frontiers marked on the annexed Map, conditionally upon discussing and regulating the conditions of such neutrality in common with the other Powers represented at the Berlin Conference.

6. The Government of the French Republic recognizes the flag of the International Association of the Congo—a blue flag with a golden star in the centre—as the flag of a friendly Government.

In testimony whereof the respective Plenipotentiaries have signed the present Convention and have affixed thereunto their seals.

Done at Paris the 5th February, 1885.

(L.S.) (Signed) JULES FERRY.

(L.S.) (Signed) Comte PAUL DE BORCHGRAVE D'ALTENA.

On the same day a Convention was signed with the Russian Empire.

1. The International Association of the Congo undertakes not to levy any duty on articles of commerce or merchandize imported directly or in transit into its present or future possessions in Africa. This freedom from custom-house duties shall extend to merchandize and articles of commerce which shall be transported along the roads of communication constructed around the cataracts of the Congo.

2. Subjects of the Russian Empire shall have at all times the right of sojourning and of establishing themselves within the territories of the Association. They shall enjoy the same protection which is accorded to the subjects or citizens of the most favoured nation, including the inhabitants of the country, in all matters which regard their persons, their property, the free exercise of their religion, the assertion and defence of their rights, both as regards navigation, commerce, and industry. Especially they shall have the right of buying, of selling, and of hiring lands and buildings, situated within the territories of the Association, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Russian flag.

3. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to subjects of the Russian Empire.

4. It is understood that Russia shall enjoy, as regards the nomination of Consuls, their functions, and Consular juris-

diction, all the rights and privileges which may be accorded to any other State.

5. In case of the Association ceding the territory now or hereafter under its Government, or any part of it, the engagements contracted by the Association towards Russia shall be binding on the concessionaire. Those engagements, and the rights thereby accorded to Russia and her subjects by the Association, shall continue to be in vigour after every cession made to any new occupant.

6. The Imperial Government of Russia, taking cognizance of the above engagements, and sympathizing with the humanizing aims of the Association, recognizes its flag—a blue flag with a gold star in the centre—as the flag of a friendly Government.

Done at Brussels the 5th February, 1885.

(Signed) Comte Bloudoff.
Baron Beyens.

The Convention between the United Kingdoms of Sweden and Norway and the International Association of the Congo is dated 10th Feb. 1885.

1. The United Kingdoms of Sweden and Norway recognize the standard of the Association—a blue flag with a gold star in the centre—as the flag of a friendly State.

2. The Association undertakes not to levy any duty, import or transit, on articles of commerce or merchandize imported by Swedish and Norwegian subjects into the present or future territories of the Association. This freedom from custom-house duties shall extend to merchandize and articles of commerce which shall be transported along the roads, railways, or canals constructed, or to be constructed, around the cataracts of the Congo.

3. Swedish and Norwegian subjects shall have at all times the right of sojourning and of establishing themselves within the present or future territories of the Association. They shall enjoy the same protection which is accorded to the subjects or citizens of the most favoured nation, including the subjects of the Government of the Association,

in all matters which regard their persons, their property, the free exercise of their religion, the assertion and defence of their rights, as well as the rights of navigation, commerce, and industry.

Especially they shall have the right of buying, of selling, of letting, and of hiring lands and buildings, mines, and forests, situated within the possessions of the Association, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Swedish and Norwegian flag.

4. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Swedish and Norwegian subjects.

5. His Majesty the King of Sweden and Norway may appoint Consuls or other Consular officers at ports or stations within the said territories of the Association, and the Association engages itself to protect them.

6. Until a form of judicial procedure has been organized in the said territories of the Association, and such organization has been notified by it, every Swedish and Norwegian Consul or Consular officer within the said territories, who shall be thereunto duly authorized by the Government of His Swedish and Norwegian Majesty, may hold a Consular Court for the district assigned to him, and shall exercise sole and exclusive jurisdiction, both civil and criminal, over the persons and property of Swedish and Norwegian subjects within the same, in accordance with Swedish and Norwegian law.

7. Nothing in the last preceding Article contained shall be deemed to relieve any Swedish and Norwegian subject from the obligation to observe the laws of the said territories of the Association applicable to foreigners, but any infraction thereof by a Swedish and Norwegian subject shall be justiciable only by a Swedish and Norwegian Consular Court.

8. Inhabitants of the said territories of the Association who are subject to its Government, if they shall commit any wrong against the person or property of a Swedish and Norwegian subject, shall be arrested and punished by the authorities of the Association according to the laws in force in the said territories.

Justice shall be equitably and impartially administered on both sides.

9. A Swedish and Norwegian subject, having reason to complain against an inhabitant of the said territories, who is subject to the Government of the Association, must proceed to the Swedish and Norwegian Consulate, and there state his grievance. The Consul shall inquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if any such inhabitant of the said territories, being subject to the Government of the Association, shall have reason to complain against a Swedish and Norwegian subject, the Swedish and Norwegian Consul shall no less listen to his complaint and endeavour to settle it in a friendly manner. If disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of the authorities of the Association to examine into the merits of the case and decide it equitably.

10. Should any inhabitant of the said territories, who is subject to the Government of the Association, fail to discharge any debt incurred to a Swedish and Norwegian subject, the authorities of the Association will do their utmost to bring him to justice, and to enforce recovery of the said debt; and should any Swedish and Norwegian subject fail to discharge a debt incurred by him to any such inhabitant, who is subject to the Government of the Association, the Swedish and Norwegian authorities will do their utmost to bring him to justice, and to enforce recovery of the debt.

No Swedish and Norwegian Consul nor any authority of the Association is to be held responsible for the payment of any debt contracted either by a Swedish and Norwegian subject, or by a subject of the Association.

11. The Association engages to do all in its power to prevent the Slave Trade and suppress slavery.

12. In case of the Association ceding the territories now or hereafter under its Government, or any part of them, the engagements contracted by the Association under this Convention shall be mentioned in the Act of Cession, and binding on the concessionaire. Those engagements, and the rights thereby accorded to Swedish and Norwegian subjects, shall continue to be in vigour after every cession

made to any new occupant of any portion whatever of the said territory.

13. This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay.

It shall come into operation immediately upon the exchange of ratifications.

Done at Berlin the 10th day of February, 1885.

(Signed) STRAUCH.
BILDT.

The Convention concluded with Portugal is dated 14th February 1885.

1. The International Association of the Congo hereby declares that it extends to Portugal the privileges it has conceded to the United States of America, the German Empire, England, Italy, Austria-Hungary, the Netherlands, Spain, France, and the United Kingdoms of Sweden and Norway, in virtue of the Conventions which it concluded with the Powers respectively on the 22nd April, 8th November, 16th, 19th, 24th, and 29th December, 1884, 7th January and 5th and 10th February, 1885, certified copies of which the Association engages to transmit to the Government of His Most Faithful Majesty.

2. The International Association of the Congo engages moreover never to grant any privileges whatsoever to the subjects of any other nation without their being immediately extended to the subjects of His Most Faithful Majesty.

3. The International Association of the Congo and His Most Faithful Majesty the King of Portugal and the Algarves adopt the following frontiers between their possessions in West Africa, namely :—

To the north of the River Congo (Zaire) the right frontier joining the mouth of the river which empties itself into the Atlantic Ocean, to the south of the Bay of Kabinda, near Ponta Vermelha, at Cabo-Lombo;

The parallel of this latter point prolonged till it intersects the meridian of the junction of the Culacalla with the Luculla ;

The meridian thus fixed until it meets the River Luculla ;

The course of the Luculla to its junction with the Chiloango (Luango Luce);

The course of the Congo (Zaire) from its mouth to its junction with the little River Uango-Uango;

The meridian which passes by the mouth of the little River Uango-Uango between the Dutch and Portuguese factories, so as to leave the latter in Portuguese territory, till this meridian touches the parallel of Nokki;

The parallel of Nokki till the point where it intersects the River Kuango (Cuango);

From this point, in a southerly direction, the course of the Kuano (Cuango).

4. A Commission, composed of an equal number on each side of Representatives of the two sides, shall be intrusted with the duty of marking out on the spot a frontier-line in conformity with the preceding stipulations. In case of a difference of opinion, the question shall be settled by Delegates who shall be named by the International Commission of the Congo.

5. His Most Faithful Majesty the King of Portugal and the Algarves is inclined to recognize the neutrality of the possessions of the International Association of the Congo, conditionally upon discussing and regulating the conditions of such neutrality in common with the other Powers represented at the Berlin Conference.

6. His Most Faithful Majesty the King of Portugal and the Algarves recognizes the flag of the International Association of the Congo—a blue flag with a golden star in the centre—as the flag of a friendly Government.

7. The present Convention shall be ratified, and the ratifications shall be exchanged at Paris within three months, or a shorter time if possible.

In testimony of which the Plenipotentiaries of the two Contracting Parties, as well as his Excellency Baron de Courcel, Ambassador Extraordinary and Plenipotentiary of France at Berlin, as representing the mediatory Power, have signed and affixed their seal to the present Convention.

Done in triplicate at Berlin this 14th day of the month of February, 1885.

(Signed) STRAUCH.
Marquis DE PÉNAFIEL.
ALPH. DE COURCEL.

Declarations were exchanged between the Belgian Government and the Association on 25th February 1885.

The International Association of the Congo declares by these presents that, by Treaties concluded with the legitimate Sovereigns in the basin of the Congo and its tributaries, vast territories have been ceded to it with all the rights of sovereignty, with a view to the creation of a free and independent State; that Conventions mark off the frontiers of the territories of the Association from those of France and Portugal, and that the frontiers of the Association are shown on the annexed Map;

That the said Association has adopted as the flag of the State administered by it a blue flag with a golden star in the centre;

That the said Association has resolved not to levy any customs duties on goods or products imported into its territories or carried by the road which has been made round the cataracts of the Congo; this resolution has been adopted to assist commerce to penetrate into Equatorial Africa;

That it insures foreigners who may establish themselves in its territories the right of buying, selling, or leasing lands and buildings therein situated, of establishing commercial houses, and carrying on trade under the sole condition of obeying the law. It engages, moreover, never to grant the citizens of one nation any privilege whatever without immediately extending it to the citizens of all other nations, and to do all in its power to prevent the Slave Trade.

In testimony of which the President of the Association, acting in its behalf, has hereunto affixed his seal and signature.

Berlin, the 23rd day of February, 1885.

(Signed) STRAUCH.

The Belgian Government takes note of the declarations of the International Association of the Congo, and by these presents recognizes the Association within the limits indicated by it, and recognizes its flag as on an equality with that of a friendly State.

In testimony of which the Undersigned, being duly

authorized thereto, have hereunto affixed their seal and signature

Berlin, the 23rd day of February, 1885.

(Signed) Comte Auguste van der Straten-Ponthoz.
Baron Lambermont.

On the same day was concluded a convention between Denmark and the Association.

1. The Royal Danish Government recognizes the flag of the International Association of the Congo—a blue flag with a gold star in the centre—as the flag of a friendly State.

2. The International Association of the Congo undertakes not to levy any duty on articles of commerce or merchandize imported directly or in transit by Danish subjects into the present or future territories of the Association. This freedom from duties shall extend to merchandize and articles of commerce which shall be transported along the roads, railways, or canals constructed, or to be constructed, around the cataracts of the Congo.

3. Danish subjects shall have the right of sojourning and of establishing themselves within the actual or future territories of the Association. They shall be placed on the same footing as subjects of the most favoured nation, including the subjects of the Government of the Association, in all matters which regard the protection of their persons, their property, the free exercise of their religion, the assertion and defence of their rights, and as regards navigation, commerce, and industry. Especially they shall have the right of buying, of selling, and of hiring lands and buildings, mines, and forests situated within the territories of the Association, and of founding houses of commerce, and of carrying on commerce and a coasting trade under the Danish flag.

4. The Association engages itself not to accord any advantages whatsoever to the subjects of any other nation without the same advantages being immediately extended to Danish subjects.

5. It is understood that Denmark will enjoy as regards the nomination of Consuls, their functions and Consular

jurisdiction, all the rights and privileges which are or may be granted to any other State.

6. In case of the Association ceding any portion of the territory now or hereafter under its Government, the engagements contracted by the Association under this Convention shall be mentioned in the Act of Cession and binding on the concessionaire. Those engagements, and the rights accorded by the Association to Denmark and Danish subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

7. This Convention shall be ratified, and the ratifications shall be exchanged with the least possible delay.

It shall come into operation immediately upon the exchange of ratifications.

In testimony of which the two Plenipotentiaries have signed the present Convention, and affixed thereto their seals and signatures.

Done at Berlin the 23rd February, 1885.

(Signed) STRAUCH.
DE VIND.

Let us restate our question : is this convincing, is this decisive? There is still more. It is so true to say that the existence of the Independent State was prior to the Berlin General Act that the Protocols of the Conference state it and attest it. Two days after the Act was signed M. Augustus Busch, who presided over the assembly by delegation, communicated a letter addressed to Prince Bismarck by the President of the International Association of the Congo. By the terms of that letter H. M. the King of the Belgians, acting as founder of the International Association, brought to the knowledge of the Prince, upon whom the presidentship of the Conference had been conferred, the fact that this Association had successively concluded with the Powers represented at the Conference (with one exception) treaties in which there appeared a provision recognising its flag as that of a

friendly State or Government. And M. Busch hailed as a happy event the communication which was thus made and which recorded he said, « the almost unanimous recognition of the International Association of the Congo. » The copies of the different treaties by which the International Association obtained the recognition were annexed to the protocol.

If a further argument is desired, let us think over what occurred on 26th February 1885 when the signature of the instruments of the General Act took place. By virtue of article 37 the Powers which had not signed the Act could adhere to its provisions by a separate act. The first adhesion was that of the International Association. It took place immediately after the formality of the signature of the instrument was accomplished. The Association acted as « a Power, » it was received as « a Power, » and it was then that Prince Bismarck hailing with satisfaction this step declared that « the new State of the Congo was called upon to become one of the principal guardians of the work that the Conference had in view. » « I record my good wishes for its prosperous development, » he added, « and for the accomplishment of the noble aspirations of its illustrious founder. »

If the facts themselves were not sufficiently convincing let us turn to the theory, to the science of international law.

We have already said at the commencement of these pages, that the recognition of a State by other States does not give existence. Far from being the result of an international recognition, the State is itself the foundation of that recognition, and, as an eminent jurist, M. Laband, has written, international law assumes existence of the State. Still more : if history shows us some creations of international law these creations are nowise States. An example of this is to be seen

in the Germanic Confederation, the creation of which was due as much to the will of the European Powers as to the will of its members. The Confederation was a product of the law of nations, and not a political body in the form of a State. The Federal Act of Germany of 8th June 1815 was a part of the final Act of the Vienna Congress, and in the Treaty of London of 11th May 1867 there was express reference to the dissolution of the Confederation (1).

The entrance of a new member into the society of States is proved by the recognition made by the members of that society. Recognition consists in admitting existence, and in accepting it (2). The word shows this.

We have examined in former studies whether conditions might be put upon the recognition, and we have shown what is the exact purport of some of the provisions of the General Act of 26th February 1885.

It must be admitted that in the international recognition of States there are no true conditions, and the possibility of introducing conditions is not visible. Even considering certain declarations expressed at the time of the recognition as conditions, the non-performance of the provisions could never put in question the existence of the new State. This State existed before recognition; its life, its being, cannot depend upon recognition (3). It is recognised or it is not recognised; there is no solution by way of compromise. This does not apply only to the recognition of new States, but also to that of new Governments, that is

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(1) P. LABAND, *Le droit public de l'empire allemand*, t. Ier. Traduction de C. Gandilhon, pp. 24 et 25.

(2) E. NYS, *La doctrine de la reconnaissance des États*, REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, 2e série, t. V, pp. 292 et suiv.

(3) E. NYS, *op. cit.*, 2e série, t. V, p. 297.

to say to *de facto* Governments arising out of insurrection. « Recognition, » says an author writing upon this latter point, « is preceded by a period of hesitation during which the third Government entertains with the new authorities extra-official or officious relations. As soon as it is certain of their solidity and regularity it performs the recognition by autograph letter, by despatch from the *chancellerie*, by declaration made by the ambassador or by some other proceeding. Recognition cannot be subordinated to any fixed condition (1). »

The General Act of the Berlin Conference of 26th February 1885 published rules from which sprang obligations to perform certain acts or to abstain from certain other acts. The rules set forth in the first four chapters are in force over 6,250,000 square kilometres (2). Their general object is to favour freedom of trade, and to establish equality of rights, setting aside all distinction of nationality. The principles which were there affirmed, the regulations which were put in force by it, apply to no State designated by name. These principles and regulations were to apply to the political communities which exercised sovereign authority over the vast territories delimited by the Conference. These communities might be European States making conquests, native populations raised to the rank of States, new States. As a matter of fact they are Germany, France, Great Britain, Portugal and the Independent State of the Congo.

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(1) Antoine Rougier, *op. cit.*, p. 500.

(2) Frédéric de Martens, *La Conférence du Congo*, Revue de droit international et de législation comparée, t. XVIII, p. 253.

VII.

The five Powers exercising the power of domination in « the Congo basin, at its mouths, and in the neighbouring countries » to employ the expression used in the heading of chapter I of the General Act, in « the conventional basin of the Congo » to make use of the usual terminology of the Act, have recognised or accepted certain obligations. In their principal lines these obligations relate to three orders of ideas, freedom of trade, abstention from all commercial monopoly, the protection of the natives. In all their purport they are obligatory for Germany, for France, for Great Britain, for Portugal, signatories of the Act and Sovereign Powers of territory forming part of the conventional basin of the Congo, as well as for the Independent State of the Congo itself. Germany, France, Great Britain, Portugal are bound on the part of their African territory comprised in the delimitation of article I. of the Act, because they signed the Act after having collaborated in drawing it up. The Independent State of the Congo is bound because in virtue of article 37 of the Act it adhered to its provisions, and because it is thus subject to the provision of the last paragraph of article 37, according to which « adhesion entails by full right the acceptance of all the obligations and admission to all the advantages. »

It will be at once understood how in the stipulations of the Act there is no question whatever of conditions. Is it possible to admit that conditions were imposed on States which, before the drafting of the General Act, already exercised complete and

entire sovereignty over territories of the conventional basin? And by what process of reasoning could it be fairly shown that a special and exceptional position had been made for the Independent Congo State, and that it alone was subjected to « conditions, » whilst the text itself of the Act shows the contrary, and seeing that, by its adhesion, the Independent State was placed, in virtue of article 37, on the same level as that of the other sovereign States having possessions in the territories governed by the first four chapters of the Act?

Account should be equally taken of this elementary truth, that if the Independent State of the Congo had failed in its international obligations, if it had departed from the engagement it contracted by adhering on 26th February 1885 to the General Act, the sanction would not be in any way the withdrawal of a recognition, which was given prior to the conclusion of the Act.

From this it may be understood, finally, that if the withdrawal of the recognition were possible, the Independent State would not any the less continue to exist because like every State it was prior to its recognition, because existence is not suppressed even under the hypothesis that the other States refuse to admit it. How often in political history have not long years rolled by before diplomacy bowed before the accomplished fact! Peoples had suffered and struggled for freedom; they had given their most precious blood for its conquest; they had gained the victory; they were free, and yet they were not « recognised »; the Powers treated them with disdain, and in diplomatic formulas they continued to figure as if they were the property of their old masters. To cite only one example, « les Gueux, » « the beggars » of the 16th century triumphed at sea, they drove away

from the soil of their country the foreign soldiery; they proved in two hemispheres the autonomy, the power, the glory of the United Provinces, and yet it was not till three quarters of a century later that they obtained the admission of this from Spain. By article 1 of the Treaty of Munster of 30th January 1648 the United Provinces were recognised as Free and Sovereign States. Let us repeat recognition authenticates the existence of the State; but existence is a notion independent of all recognition. The State is, it exists, even when the other States dispute its existence, or pretend to ignore it.

VIII.

But the Independent State of the Congo, let us say, has loyally acquitted itself of what the Berlin Act calls « obligations, » and not « conditions. »

As concerns the *régime foncier* the Independent State of the Congo has acted as the other States have acted on the territories subject to the provisions of the Berlin Act: Germany, France, Portugal, Great Britain. In the private domain of every State, that is to say among those possession over which the State exercises the right of proprietorship, and of which it disposes just as the individual proprietor might do, vacant lands are included. The principle is a principle of civil law and of public law. International law has neither to examine nor to study it. It is rational, it justifies itself, it is even imposed by the science of law and by the science of political economy alike. It must be proclaimed on account of the impossibility of imagining anything else than the State 's right of

property over the parcels of its territory on which no proprietorship is exercised by an individual or by a particular society. It must be applied to avoid all covetous designs, all the greedy competitions, which would arise in a country composed of regions over which no one would be the master.

In a previous study we have shown how the measures taken as concerns vacant lands have been in conformity with legal rules; how they have been normal that is to say similar to those taken in analogous circumstances by other sovereign States; how they have been equitable since the rights previously acquired by Europeans have secured definitive protection, and since the proprietorship of lands occupied or cultivated by the natives was respected and remained subject to local customs and local usages. A State, let us say, disposes as it wishes of the lands constituting its private domain; it sells them; it lets them; it places on its concessions such conditions as it deems useful; the purchasers, the lessees, know the purport of their undertaking. The State itself exploits its lands if it deems it proper to do so. In nothing does it owe explanations or accounts to other States. In this respect not one provision of the Berlin General Act can be appealed to. In this matter there is no question of freedom of trade, or of free competition; there is no question of privilege or of favour; it is a question purely and solely of a proprietor using his right of proprietorship. It is a civil act, not an act of international law (1).

The question of monopolies and favours in matters of trade has been raised as if they furnished legitimate

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(1) E. Nys, *L'État indépendant du Congo et les dispositions de l'Acte général de Berlin*, Revue de droit international et de législation comparée, 2e série, t. V, p. 326.

grounds of accusation against the Independent State. The truth is that in Article 5 of the Berlin General Act, the words « monopoly nor favour of any kind in matters of trade » do not include in any way the concession or the exploitation of vacant lands which constitute proprietory or civil acts. And what is the proof that the word « monopoly » has solely in view traffic and commerce? It is furnished by the etymology of the word, which comes from the Greek μόνος, alone, and πωλειν to sell, and which means « exclusive traffic made by virtue of a privilege. » It is furnished by the history of political economy and trade, where monopoly appears as the contradiction, as the negation of free competition. It is furnished by the preparatory works of the Berlin Conference, and by the luminous report of Baron Lambermont. It is furnished by the topical consideration that it is highly probable that it was due to the English Government that the term « monopoly » was introduced into the General Act. The word, in fact, figured in the treaty signed at London on 26th February 1884 between Great Britain and Portugal, a treaty which excited such warm opposition, and which caused the convocation of the Berlin Conference. And in this treaty, there is no possible room for doubt : monopoly is a commercial monopoly: « The trade and navigation, » it is said in article 4, « of all rivers and water ways within the territory specified in article 1, and along the sea coast thereof shall be open to the flags of all nations and shall not be subject to any monopoly, exclusive concession or other impediment nor to any custom duties, tolls, charges, fees, fines or other imposts whatever not expressly provided for in the present treaty... (1). »

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(1) E. Nys, *op. cit.*, p. 329.

The Independent State of the Congo has neglected no effort, has spared no sacrifice to realise the humanitarian wishes of the Berlin Conference of 1884-1885, and of that of Brussels of 1889-90. The suppression of the horrible slave trade, the establishment and guarantee of order and security, the creation of lines of railway, the organisation of the river navigation, measures of hygiene, improvement of the natives' conditions of life; these show some of the directions in which progress has been accomplished.

The Independent State does not at all ignore the criticisms of which it has been the object. « It has been sustained » it says in an official document « that the native populations find themselves of necessity badly treated because they are subjected on one hand to military service, and on the other to certain taxes... Military service no more constitutes slavery in the Congo than it does in any country where the system of the conscription exists. The recruiting and the organisation of the public force are the subject of minute legislative enactments to prevent abuses. After all military service does not weigh heavily on the population from which it asks only one man in every ten thousand. To deal with the errors that obtain credit on the subject of the Public Force it may be said once more that it is exclusively composed of regular troops, and that « irregular levies » formed from undisciplined and savage elements do not exist. Care has been taken to remove gradually the posts of black soldiers, and at the present time all the military posts are under the command of white officers. The increased number of agents permits the embodiment everywhere of European elements with the detachments of the Public Force. As to the prestations in kind that the authorities ask from the natives this collection is as legitimate as any other

kind of tax. It does not impose upon the native any obligations of a different nature or heavier than the system of different taxes in use in the neighbouring colonies such as the hut tax. It is the participation of the native in the public charges in exchange for the protection given him by the State, and this participation is light seeing that it represents on an average no more than 40 hours of labour for the native in a month (1). »

Accusations have been made which cast suspicion on the leaders of the State since they tended to nothing less than to make them the accomplices in acts of barbarity and cruelty towards the native populations which the Berlin General Act had taken under its protection. The document which we have just quoted from deserves to be called once more into testimony : —

« Acts of violence have unhappily been committed on the natives in the Congo as generally throughout Africa : The Congo State has never denied nor concealed them. The *parti pris* of the detractors of the State is revealed by their representing these facts as the inevitable consequence of a bad system of administration or by their declaring that the Government has tolerated them. Those Europeans who have been found guilty of these acts have been punished by the tribunals, and a certain number of them are actually paying in the prisons of the State for their breaches of the penal laws that protect the lives and persons of the natives. These cases have been exceptional if allowance be made for the extent of the territory, and the proof is given in the recent publications against the Congo State which

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(1) *Bulletin officiel de l'État indépendant du Congo*, June 1903, p. 25.

have been obliged in order to prop up their accusation, to take up facts going back almost ten years, and even to quote, among other testimonies, that of a commercial agent who was himself condemned for ill-treating the blacks. It is a fact worthy of note that the Catholic missionaries have never denounced this general system of cruelty imputed to the State and if judicial statistics show the rigour of the repressive tribunals it is not to be deduced therefrom that there are more numerous criminal cases in the Congo than in other colonies of Central Africa. To read the conclusions of foreign polemical writers it clearly appears that the accusations made against the State form part of a concerted programme in view of the object pursued, and it is in the order of things that the promoters of the campaign will continue to cast discredit on the State as long as they have not attained the object that they aim at in their writings. Public opinion has allowed itself to be moved by exaggerations and generalisations skilfully arranged. From this biassed opinion it is necessary to appeal to impartial opinion, which basing its judgments on a calm and well reasoned examination of all the elements in the case will appreciate the whole of the work in a spirit of justice, and will not refuse its sympathy to efforts which have already led to incontestably satisfactory results (1) .»

IX.

We might stop at this point. The legal position of the Independent State of the Congo appears to us to be established with all desirable clearness. The

(1) *Op. cit.*, p. 26.

Independent State is a Sovereign State; its existence was prior to the General Act of Berlin; that Act could not impose, and did not impose on it, any « conditions, » the nonfulfilment of which would expose the State to any grave penalty. The Independent State has performed all its international obligations and it has always acted in conformity with the law.

None the less we feel bound to add a few words. An unhealthy dream haunts some minds. They wish for the destruction of the Independent State, they wish to subdivide it, they seek, as the preliminary measure to its annihilation, to oblige the Independent State to appear as the accused before the signatory States of the Berlin General Act.

In very truth, this is to cast doubt on the progress of the world. We are at the commencement of the 20th. century : as the result of prodigious efforts a State has been formed on territories given up, until a few years ago, to all the abominations of slavery and the slave trade; Europeans have enlarged the domain already so extended over which they have spread a civilisation which, despite its imperfections, is the noblest civilisation that has ever prevailed on this planet : an international Conference applauded this attempt; it encouraged labour and valour by a special mark of favour; it conceded the advantage of neutrality; still more it provided, in the case of serious disagreement, the obligation of mediation and the faculty of arbitration. And politicians dare to propose, in contempt for all the principles of international law and of elementary justice that this State should be driven out of the society of nations!

And what procedure will be followed? But if all the ignominious attacks were justified; if thousand criminal actions were proved, still the article 12 of the General Act would impose mediation and permit

recourse to arbitration. What then do these self constituted justiciaries imagine? Do they think that some decree which they formulate in an article of a review or in a parliamentary speech is sufficient to destroy the superior power that constitutes the sovereign State?

Will recourse be had to a new assembly of the signatories of the Berlin General Act?

Is it in virtue of the Act itself of 26th February 1885 that the Powers will reassemble?

Article 36 must be exactly translated in these terms : « The signatory Powers of the present General Act reserve to themselves to introduce into it subsequently, and by common accord, such modifications *or* improvements as experience may show to be expedient. »

In our opinion the text of article 36 in no way authorises the summoning of a Conference of the signatory States which would have as its object any breach whatever of the rights possessed by the Independent State of the Congo by virtue of its existence as a State.

Let us weigh its words. The text states that « modifications or improvements » might be introduced « by common accord » into the Act. It requires « accord, » it thus dismisses the hypothesis that one of the States should appear as the guilty, or as the accused or even as the suspected, since a condemnation pronounced by a vote in which the accused would itself take part is beyond comprehension.

The text refers to « modifications or improvements. » The rules of interpretation require that the sense of the words employed in the interpreted document should be taken into account. The Act does not say « the modifications and *the* improvements. » It designates a single and the same thing : « modifica-

tions, » that is to say according to it « improvements.»

Besides has the total impossibility been well thought over for the States possessing territories in the conventional basin of the Congo to abdicate the exercise of their sovereignty, and to admit the hypothesis of a new assembly of the Conference which might summon them before it to render an account of their administration and policy? Indeed it must not be forgotten that « modifications or improvements » with which Article 36 deals apply to the territories of all the States having possessions in the conventional basin of the Congo.

It may even be asked whether the adversaries, the enemies, of the Independent State have ever read the protocols of the Berlin Conference.

We have just reproduced the text of Article 36. It gave rise to no discussion whatever at the sitting of the Conference of 23rd February 1885, and the text was adopted without observation. But Baron Lambermont 's report which is annexed to the protocol of that sitting acquaints us with the full history of the provision, its object, its exact purport.

The part of the report more especially devoted to article 36 is entitled : « Revision of the General Act. »

« The work of the Conference, » wrote the reporter, « must before everything offer guarantees of stability, without which the spirit of enterprise would remain paralysed. But as the commission has already had the honour to remark in a previous report to you, when the movement shall be given, and real progress accomplished, new perspectives, and necessities will probably reveal themselves, and the moment may arrive when a wise foresight will demand the revision of a regime which was adopted at a moment of creation and transformation.

« These reflections apply to a special case, the

regime of the entry duties. Your commission has thought that they might receive a wider application.

» The situation being what it is in the Congo regions it seems difficult and perhaps premature to attempt to see and regulate everything in advance.

» By subordinating all modification of the acts of the Conference to an accord of the Powers enlightened by facts, justice will be done to the exigencies of the future, and for the permanence of your decisions.

It is from these considerations that your commission proposes to you to suppress the articles which related to the future revision of the navigation acts of the Congo and the Niger, and to convert them into a clause which should apply to the General Act in its entirety. »

The new clause became article 36.

The sense itself, clear moreover, and not lending itself to the least equivocation, is indicated for us by Baron Lambermont, when the two proposed acts of navigation relative to the Congo and the Niger were in question, proposals which became chapters 4 and 5 of the General Act. Each proposal contained an article anticipating the possibility of revision. The text of each was as follows. « The signatory Powers of the present Act reserve to themselves to introduce later on, and by a common accord the modifications or improvements the utility of which should have been shown by experience. » These two articles disappeared as we have just seen to give place to an article applying to all the provisions of the General Act. But this article of the General Act is to be interpreted, and commentated like the two original articles. Besides what did the Commission presided over by M. de Courcel, and of which Baron Lambermont was the reporter say? « Article 9, » it declared on the subject of the Niger, « is common to the two acts; it provides for the revi-

sion of the preceding clauses with the idea of introducing the improvements into them that experience shall have pointed out. »

There is no question then of reprimanding, of blaming, of chastising in the case arising. Let us not forget that in law all the Powers who signed the Berlin Act did so on a footing of perfect equality. Let us not forget that the Powers possessing territories in the conventional basin have the same titles and the same duties. Nothing could be legally changed without the same consent and without the same free and unanimous procedure which by the Act of Berlin brought about the present legal situation. Any illegal modification of the Act would be to tear it up and to restore their liberty to the signatories. They would be relieved of all the obligations they have contracted. The conventional regime in the conventional basin would be no more.

And if the dreamed of conference is not to derive its powers from the 36th article of the Berlin General Act, by what right will it be convoked. Will it be a return to the policy of Metternich, to those diplomatic assemblies which he used to consider it his glory to have originated (1). The Congresses of Troppau in 1820, of Laybach in 1821, of Verona in 1822, proved that the whole system was directed against the freedom and independence of States, and England is entitled to the glory of having abolished the abuse and broken the instrument of oppression.

Finally whether it be conference or congress, the decisions must be taken not by the plurality, but by the unanimity of votes ; in other words perfect accord is

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(1) E. Nys, *Etudes de droit international et de droit politique*, 2e série, 1901. *The European Concert*, p. 1.

indispensable (1). The doctrine is precise and moreover it only embodies the teaching of practice.

These are the reflections suggested to the jurist by the announcement of the measures which it is said the English Government is preparing to take. Even the summoning of the Conference is not justified and it cannot be seen how the proposals to be submitted to it, and the decisions to be adopted by it could be given a legitimate form.

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(1) A. G. Heffter, *Le droit international de l'Europe*. Édition revue par H. F. Geffcken, p. 545.

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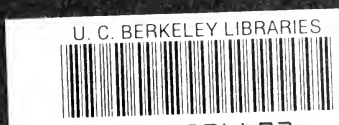

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